E COPY

FILED
NOV 1 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-487

RUDOLPH PRISCO,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BURTON B. ROBERTS
District Attorney
Bronx County
Attorney for Respondent
851 Grand Concourse
Bronx, New York 10451

ELIOT L. KAPLAN
Assistant District Attorney
Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Argument	
Point One—No federal questions were presented for this Court's review	5
Point Two—No constitutional issue has been presented	7
A. Concerning the Trial Court's failure to notify defense counsel during the jury's deliberations that an ill juror had received medical attention from his own doctor	7
B. Concerning the Hearing Courts' denial of the motion to controvert the search warrant and suppress the evidence seized	9
C. Concerning the alleged prosecutorial misconduct	12
Conclusion	15
Appendix A—Decision and Opinion of Appellate Division	A1
Appendix B—Affidavit for Search Warrant	A7

TABLE OF AUTHORITIES

PAGE

Cases:

Aguilar v. Texas, 378 U.S. 108 (1964) 9

Chapman v. California, 386 U.S. 18 (1967) 14

Gatewood v. United States, 209 F.2d 789 (D.C. Cir. 1953) 11
Gray v. State, 143 Fla. 588, 197 So. 33 (1940) 7, A5

Hair v. United States, 289 F.2d 894 (D.C. Cir. 1961) 11
Haley v. State, 123 Miss. 87, 85 So. 129 (1920) 7, A5

Jones v. United States, 362 U.S. 257 (1960) 9

LaGuardia v. State, 190 Md. 450, 58 A.2d 913 (1948) 7, A5

Masiello v. United States, 304 F.2d 399 (D.C. Cir. 1962) 11
Miller v. United States, 357 U.S. 301 (1958) 11

People v. Durling, 303 N.Y. 382 (1952) 8
People v. Floyd, 26 N.Y.2d 558 (1970) 11
People v. Gowasky, 244 N.Y. 451 (1927) 13
People v. Hendricks, 25 N.Y.2d 129 (1969) 9, 10
People v. Johnson, 231 N.Y.S. 2d 689 (Ct. Gen. Sess. N.Y. Cty. 1962) 11
People v. Law, 55 Misc.2d 1075 (Cortland Cty. 1968) 11
People v. Loria, 10 N.Y.2d 368 (1961) 9
People v. Montague, 19 N.Y.2d 121 (1967) 9
People v. Montanaro, 34 Misc.2d 624 (Kings Cty. 1962) 12
People v. Schnitzler, 18 N.Y.2d 457 (1966) 9
People v. Schwartzman, 24 N.Y.2d 241 (1969) 14

Sabbath v. United States, 391 U.S. 585 (1968) 11
Spinelli v. United States, 393 U.S. 410 (1969) 9

PAGE

Takarsie v. State, 81 Okl. Cr. 189, 162 P.2d 197 (1945) 7, A4

United States v. Ventresca, 380 U.S. 102 (1965) 9

Williams v. State, 171 So. 386 ..... A4

Constitution of the United States:

Fourteenth Amendment 3

Miscellaneous:

New York Code Crim. Proc.
§421 ..... A3
§542 14
§799(a) 11

New York Crim. Proc. Law
§310.10 ..... A3

Statutes:

C.J.S. §1356, p. 955, n.58 ..... 7, A5
Stern & Grossman, *Supreme Court Practice*, Sec. 3.29, pp. 128-131 (4th ed. 1969) 5

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-487

RUDOLPH PRISCO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered June 1, 1972 [30 N.Y.2d 808], unanimously affirming, without opinion, an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered November 16, 1971 [37 A.D.2d 369], which affirmed, with an opinion, a judgment of the Supreme Court of the State of New York, Bronx County, rendered December 17, 1970, convicting the petitioner, after trial by jury, of the crimes of Promoting Gambling in the First Degree [New York Penal Law, §225.10] and Possession of Gambling Records in the First Degree [New York Penal Law, §225.20], and sentencing him to serve a term of one year in the New York City Correctional Institution for Men. He is presently at liberty on bail pending determination of this application.

Opinions Below

The Appellate Division of the Supreme Court unanimously affirmed the judgment in an opinion [37 A.D.2d 369] which is reproduced in Appendix A. The Court of Appeals unanimously affirmed without opinion [30 N.Y.2d 808].

Jurisdiction

The jurisdiction of this Court is evoked under 28 U.S.C. §1257(3). The order of the Court of Appeals was entered on June 1, 1972. The order of the Appellate Division was entered on November 16, 1971.

Questions Presented

In our view no substantial federal questions have been presented in this case. Nevertheless, we shall list the claims petitioner has set forth:

1. Whether petitioner was denied a fair trial by virtue of the Trial Court's communicating with a member of the jury during its deliberations, summoning the juror's own personal physician, and permitting the administration of a drug without ever notifying defense counsel or petitioner, until after the matter was a *fait accompli?*

2. Conceding that a Court may react to any medical emergency involving a juror, may the Court permit such juror to resume deliberations after having summoned medical aid for him and permitting the administration of a drug, without first holding a hearing at which defense counsel could question the doctor and, if need be, the juror, about the nature of his illness, the type of drug administered, and his ability to resume deliberations?

3. Whether in this "dropsey" gambling case the petitioner's rights under the Fourth Amendment were vio-

lated by the Trial Court's refusal to suppress evidence obtained as a result of an unlawful search and seizure?

4. Whether the petitioner received a fair trial in view of the prosecutor's remarks to the jury that the Trial Judge had already passed upon the propriety of a search and seizure?

Statement of the Case

But for several parenthetical references to the Fourteenth Amendment to the United States Constitution in his brief (Petition, pp. 2-3), petitioner fails to allege that any substantial federal or constitutional question is raised by the issues he is presenting for this Court's consideration. His claims appear to be that errors were committed by both the trial court and prosecutor which deprived him of a fair trial and hence of the due process guaranteed by the Fourteenth Amendment. We note, however, that petitioner failed to seek amendment of the remittitur to reflect that the state courts passed upon federal or constitutional issues.

The arrest and subsequent indictment of defendant grew out of observations made on March 24, 1969 by Detective Walter Laurie of the New York City Police Department. The detective had observed defendant drop three packages in an alleyway the contents of which were banker's statements and slips of paper displaying dates almost a week old and bearing in excess of 310,000 plays of Mutuel Race Horse Policy—indications of a "banker" (Laurie A-120-24, 127, 136-37;* Affidavit for Search Warrant).** Defendant had just come from an apartment in which he had remained approximately three and one-half hours and to which he now returned (*id.*, 119-26).

---

* References are to pages of petitioner's appendix in the Court below unless indicated otherwise.

** See Appendix B to respondent's brief.

Such observatoins having been related to Patrolman John Hatton of the New York City Police Department, application was made by the patrolman on the following day, March 25, 1969, for a warrant authorizing the search of said apartment as well as the persons of petitioner and one James Ercolani to whom the premises were registered. The warrant having been issued, execution was made the same day at which time defendant was arrested in the premises in possession of 14 banker's statements, about 1,025,000 plays of Mutuel Race Horse Policy and numerous other gambling paraphernalia (Hatton A-374, 375, 377-79).

Defendant was subsequently indicted by the Grand Jury of Bronx County in two separate proceedings charging him initially with the crimes of Promoting Gambling in the First Degree (New York Penal Law, §225.10) and Possession of Gambling Records in the First Degree (New York Penal Law, §225.20) arising out of the events occurring upon the execution of the warrant on March 25 (Ind. #1809 of 1969) and, subsequently, with the same identical crimes arising out of the events of the preceding day (Ind. #2281 of 1969).

Prior to trial a hearing was held upon defendant's motion to controvert the warrant and suppress the evidence seized on both occasions. The motions having been denied in a written opinion by Thomas Dickens, Justice of the New York Supreme Court [61 Misc. 2d 730] after the hearing, both indictments were consolidated for trial over the People's objection. Although the jury was unable to reach a verdict as to Ind. No. 2281/69 and was discharged with respect thereto, it did find defendant guilty of both counts as charged in Ind. No. 1809/69 with respect to the events of March 25, 1969.

During the jury's deliberations one of the jurors became ill. After deliberations were discontinued, the trial court determined the identity of the juror's doctor and without notifying defense counsel summoned him to the courthouse where the juror was administered a drug, rested a few minutes and then rejoined the other jurors who thereupon recommenced deliberations. After the doctor had administered his treatment he was allowed to leave and was not held available for examination by defense counsel.

On December 17, 1970 defendant was sentenced to a term of one year in state prison. Such judgment was affirmed, with an opinion, by the Appellate Division and again by the New York Court of Appeals, without opinion. No application has been made to amend the remittitur.

Defendant has been at liberty throughout pending final determination of his direct appeal.

ARGUMENT

POINT ONE

No federal questions were presented for this Court's review.

Indicative of the absence of any federal questions raised by this record is petitioner's failure to seek an amendment of the remittitur in the New York Court of Appeals. Such failure makes the basis for the Court of Appeals' affirmance without opinion unclear and necessitates dismissal of the instant petition [see Stern and Grossman, *Supreme Court Practice*, §3.29, pp. 128-131 (4th ed. 1969)].

Nor does the opinion of the lower state court indicate that a federal question was raised. In the Appellate Division petitioner raised the identical points which he argues before this Court, all three of which were determined to be "without merit" (see Decision and Opinion of Appellate Division, Appendix A, *infra,* p. 1a). Although such Court did expound upon the propriety of summoning a doctor to treat an ill juror during the jury's deliberations without notifying counsel, such question being one of first impression, it found no statutory violations nor any prejudice to petitioner. No mention of the existence of a federal question appears in such opinion. In fact, the entire record is devoid of any such question warranting this Court's review.

We note further that the Appellate Division, in its opinion, has delineated a procedure to be followed in the future, viz.—to hold the physician available for examination by defense counsel. As a practical matter, therefore, the procedural problem occurring in this record will no longer arise.

POINT TWO

No constitutional issue has been presented.

Although petitioner's arguments imply the denial to him of due process, an analysis of the record indicates that such arguments lack merit. Such a conclusion gains force from petitioner's failure to amend the remittitur.

A. Concerning the Trial Court's failure to notify defense counsel during the jury's deliberations that an ill juror had received medical attention from his own doctor [answering petitioner's brief, Point I, pp. 16-21].

Upon the discontinuance of the jury's deliberations due to the illness of one of the jurors, the Trial Court ascertained the identity of the juror's doctor and, without notifying defense counsel, summoned him to the courthouse where the juror was administered a drug, rested a few moments and then rejoined the other jurors whereupon deliberations recommenced. The only communications with the juror related to his physical condition. The drug administered was not morphine and the physician had indicated that the juror was fully able to participate in the deliberations (A-585-88).

The New York state courts determined that such proceedings did not prejudice petitioner and that, absent any prejudice, reversal of the judgment was not required. Other jurisdictions have concurred in such a holding [see, *e.g.*, *LaGuardia* v. *State,* 190 Md. 450, 58 A.2d 913 (1948); *Takarsie* v. *State,* 81 Okl. Cr. 189, 162 P.2d 197 (1945); *Gray* v. *State,* 143 Fla. 588, 197 So. 33 (1940); *Haley* v. *State,* 123 Miss. 87, 85 So. 129 (1920); C.J.S. §1356, p. 955, n. 58].

As the Appellate Division indicated, a reasonable rule to follow under such circumstances would be to allow the Court to determine, in its sound discretion, what course of action to follow in treatment of an ill juror, whether to notify defense counsel or defendant and await their presence, and whether, in view of the proceedings that do take place, a new trial should be granted. For example, treatment of an urgently ill juror should not be required to await such notification and presence. Nor should the failure to notify counsel of such fact, even where the illness is minor, mandate reversal of the judgment absent prejudice to the defendant.

While a remand for a hearing to consider whether petitioner was in fact prejudiced might of course be ordered in an appropriate setting [see *People* v. *Durling*, 303 N Y 382 (1952)], we note that there is no evidence that the ill juror was influenced in any way or even approached in regard to the case. Indeed, the Appellate Division opinion took that tack, but also decreed that henceforth in New York doctors appearing under similar circumstances should ideally be kept available for examination by defense counsel. Here, there appears to be virtually no chance of the instant problem arising again in New York State—a jurisdiction whose reaction to the relevant issue comports, we submit, with modern notions of due process.

In sum, no prejudice to petitioner resulted from the Trial Court's action. He was not deprived of the due process of law and his claim does not warrant this Court's review.

B. Concerning the Hearing Court's denial of the motion to controvert the search warrant and suppress the evidence seized [answering petitioner's brief, Point II, pp. 21-26].

Petitioner argues that Patrolman Hatton's affidavit [see Appendix B, *infra*, p. A7] failed to establish sufficient probable cause to justify issuance of the search warrant. Determination as to whether a constitutionally valid hearsay affidavit [see *People* v. *Hendricks*, 25 N.Y. 2d 129, 133 (1969); *People* v. *Loria*, 10 N.Y. 2d 368, 374 (1961)] evidences sufficient probable cause depends upon whether it states "a substantial basis for crediting" such hearsay [*Jones* v. *United States*, 362 U.S. 257, 272 (1960)]. In such a case the affidavit must satisfy a dual test. It must show

> "(1) whether the informant is in fact reliable and (2) whether the underlying circumstances as to how the informant came by his information demonstrate sufficient probability of credibility to allow the search of the premises or person in question" [*People* v. *Hendricks*, *supra* at 133, citing *Spinelli* v. *United States*, 393 U.S. 410 (1969) and *Aguilar* v. *Texas*, 378 U.S. 108 (1964)].

The affidavit before the issuing Court stated that the affiant's information was "based upon statements supplied to me by an undercover New York City Police Officer assigned to the First Deputy Comissioner's Public Morals Administrative Division" (A-596). Being a government agent, the informant's "veracity could with relative assurance be relied upon" [*People* v. *Montague*, 19 N.Y. 2d 121, 123 (1967); see *United States* v. *Ventresca*, 380 U.S. 102, 111 (1965)], his character could accordingly be vouched for [*cf. People* v. *Schnitzler*, 18 N.Y. 2d 457 (1966)], and his reliability thereby inferred.

Moreover, probable cause sufficient to justify issuance of the warrant was established by Detective Laurie's, the informant's, disclosure of the circumstances upon which he concluded that defendant had committed a crime and that a search of the premises in question would reap contraband. The affidavit recounted petitioner's entry into the subject apartment, his exit therefrom three and one-half hours later, and his discarding of three packages evidentiary of the illegal promotion of gambling and possession of gambling records and of his status as a "banker." The recitation of such factual basis in the affidavit satisfied the second prong of the constitutional test—the information was sufficiently detailed to set it apart from the category of rumor and there is no question but that the informant was speaking from firsthand knowledge and observations [*cf. People* v. *Hendricks*, 25 N.Y. 2d 124, 134 (1969)].

It is further claimed that Patrolman Hatton's failure to announce that he was in possession of a search warrant rendered unconstitutional the procedural execution of the warrant (see petitioner's brief, pp. 24-25).

The evidence at the hearing established that, in executing the warrant, Patrolman Hatton knocked on the apartment door, stated that he was a police officer, waited about fifteen seconds "for an answer, to give somebody more information if they requested it," and then forced the door open with his shoulder and entered the premises (A-34, 54, 55).* Petitioner was seated in the back room of the apartment.

* At trial, an additional witness corroborated that entrance was made approximately fifteen seconds after the knock (A-485).

Although forcible entry in execution of a warrant is permitted "if, after notice of [the officer's] authority and purpose, he be refused admittance" (Code Crim. Proc. §799(a)), such an entry should not be proscribed where a knock on the door and an announcement of "police" produce no response. In cases where forcible entry was held to nullify execution the officers either failed to give any notice whatsoever [*People* v. *Floyd*, 26 N.Y. 2d 558 (1970) (arrest warrant); *Sabbath* v. *United States*, 391 U.S. 585 (1968) (officers knocked but did not identify themselves); *Gatewood* v. *United States*, 209 F.2d 789 (C.D. Cir. 1953) (officers claimed they were from Western Union)] or failed to await refusal of admittance despite acknowledgment of their presence [*Miller* v. *United States*, 357 U.S. 301 (1958), *Masiello* v. *United States*, 304 F.2d 399 (D.C. Cir. 1962) (in which the accused had stated "Just a minute"); *Hair* v. *United States*, 289 F. 2d 894 (D.C. Cir. 1961)].

No such acknowledgment was offered in the instant case. Petitioner was still in the back of the apartment when the officers entered indicating his lack of intention to respond and the police may justifiably have assumed that the apartment was unoccupied, a circumstance permitting of forcible entry [*cf. People* v. *Johnson*, 231 N.Y.S.2d 689, 691 (Ct. Gen. Sess. N.Y. Cty. 1962); *People* v. *Law*, 55 Misc. 2d 1075, 1078 (Cortland Cty. 1968)]. Having knocked, announced themselves and received no response, the officers should not have been required to continue to verbalize a catechism which, under the circumstances, would have been only an unnecessary, time-wasting formality. Mandating such an exercise where initial inquiry has produced no response would be to exalt a formal procedure above common sense.

Moreover, the objects of the search under the warrant were gambling records, easily disposable items. Under such circumstances officers should only be required to make a conscientious effort to enter peaceably (e.g., knock, announce that they are police and wait for a response) and, if there is no response, forcible entry should be permitted [*cf. People* v. *Montanaro*, 34 Misc. 2d 624, 630 (Kings Cty. 1962)].

The Hearing Court's denial of petitioner's motions to controvert and suppress was properly based upon sufficient legal evidence and did not deprive him of any constitutional rights.

C. Concerning the alleged prosecutorial misconduct [answering petitioner's brief, Point III, pp. 26-29].

Petitioner argues that his right to a fair trial was prejudiced by the District Attorney's statements during trial and summation that (A-337)

> "Your Honor, I'm going to persist in the objection as to the irrelevancy on this matter. We're not to review the procedure in which a search warrant was obtained. It has already been reviewed and passed upon."

and that (A-543) "the crime occurred in March of 1969. The hearing in this case occurred in November of 1969. The Grand Jury—." He claims that such references, to which he raised timely objections, indicated to the jury that there had been another hearing and that they "obviously * * * believed that they should not * * * second guess another tribunal" (petitioner's brief, p. 27).

It is first noted that discussion of the pre-trial hearing was initiated by defense counsel himself who, in cross-examination of Detective Laurie, asked "And these answers you read only how long ago, the answers you made back in November of '69, in front of Judge Dickens. When did you read these last, your answers?" (A-288) and "Were you given a transcription of your answers that you made back in November '69 * * *?" (A-289). During summation as well defense counsel stated that the detective "testified here that he also read questions that were directed to him back in November before Judge Dickens."

Furthermore, to the extent that the Court sustained counsel's objection to the People's statement (A-337-38), it later instructed the jury that (A-553)

> "[D]uring the course of the trial, the court has made rulings with respect to evidence. It has ruled certain questions improper and directed certain testimony to be stricken. Anything the court has directed to be stricken, you will disregard. You cannot take that into consideration in arriving at your verdict.
>
> "And of course, gentlemen, you may not consider questions as evidence in the case. Questions by themselves or the implications contained in questions mean nothing. What is important is the answer * * * But you cannot impart into this case implications, innuendoes or suggestions which are contained in questions not borne out by testimony given by a witness."

Such a curative instruction was sufficient to assure that the People's statements would not be considered in the jury's deliberations since jurors "generally do their duty when it is made clear to them" [*People* v. *Gowasky*, 244 N.Y. 451, 464 (1927)].

In any event, the prosecution's remarks did not prejudice petitioner. The only issue submitted to the jury was petitioner's guilt or innocence of the crimes charged. In making such determination, the jurors were not required to "second guess another tribunal" (petitioner's brief, p. 27) which had made a ruling on the legality of the search warrant and the admissibility of the proffered evidence seized thereunder. On the contrary, the jury was not concerned with the warrant but rather only the factual issue of whether or not petitioner was in possession of the gambling records and was promoting gambling. The existence of the search warrant, no less its legality, did not affect the jury's deliberations and verdict and petitioner was not prejudiced by reference to the pre-trial hearing.

However, should this Court disagree and be of the opinion that the People's statements were improper, it is submitted that any error flowing therefrom was, in view of the overwhelming proof of guilt of the crimes charged relating to March 25, harmless beyond a reasonable doubt [*Chapman* v. *California*, 386 U.S. 18 (1967); *People* v. *Schwartzman*, 24 N.Y. 2d 241, 251 (1969); New York Code Crim. Proc., §542].

We note, finally, that the New York cases cited comport with the due process requirements mandated by this Court and that no constitutional question is presented.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

BURTON B. ROBERTS
District Attorney
Bronx County
Attorney for Respondent

ELIOT L. KAPLAN
Assistant District Attorney
Of Counsel

Dated: Bronx, New York
October, 1972

APPENDICES

Appendix A

Decision and Opinion of Appellate Division

SUPREME COURT, APPELLATE DIVISION
First Department, October 1971

Harold A. Stevens, P.J.,
Louis J. Capozzoli,
Emilio Nunez
Theodore R. Kupferman,
James B.M. McNally, JJ.

The People of the State of New York,
Respondent,

—against—

Rudolph Prisco,
Defendant-Appellant.

Appeals from a judgment of the Supreme Court, Bronx County, rendered on December 17, 1970, convicting defendant of the crimes of Promoting Gambling in the First Degree and Possession of Gambling Records in the First Degree after a trial before Greenfield, J., and a jury.

Irving Anolik, attorney for defendant-appellant.

Eliot L. Kaplan of counsel (Burton B. Roberts, District Attorney) for respondent.

McNALLY, J.

The defendant appeals from a judgment of the Supreme Court, Bronx County, rendered December 17, 1970, convicting him, after trial to a jury, of the crimes of promoting gambling in the first degree and possession of gambling records in the first degree and sentencing him to a term of one year.

On this appeal, the defendant claims that (1) his motion to controvert the search warrant and suppress the evidence was improperly denied; (2) the District Attorney improperly referred during the trial to a pre-trial suppression hearing; and (3) the court erroneously permitted a doctor to administer medical treatment to an ill juror after the jury had commenced deliberation without notification to defense counsel.

We have examined these assignments of error and find them to be without merit, and consequently we affirm.

However, there is an important question posed by this appeal, apparently one of first impression in this State, concerning the right of the trial judge to summon medical aid for a juror while the jury is deliberating without notifying counsel.

No New York statute or case law appears to have considered the precise question as to whether or not a defendant is prejudiced by the failure to notify his counsel after the jury commences deliberations that an ill juror had received medical attention from his own doctor under the direction of the trial court.

Appendix A

This case was tried in December 1970. Consequently Section 421 of the Code of Criminal Procedure applies. It provides:

> "After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn, to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court."

Section 310.10 of the Criminal Procedure Law, effective September 1, 1971, provides:

> "Following the court's charge, the jury must retire to deliberate upon its verdict in a place outside the courtroom. It must be provided with suitable accommodations therefor and must be continuously kept together under the supervision of an appropriate public servant or servants. Except when so authorized by the court or when performing ministerial duties with respect to the jurors, such public servant or servants may not speak to or communicate with them or permit any other person to do so."

It appears upon the discontinuance of the jury's deliberations due to the illness of one of the jurors, the court ascertained the identity of the juror's doctor and, without notifying defense counsel, summoned the doctor to the courthouse where the juror was administered a drug, rested

a few moments and then rejoined the other jurors, whereupon deliberations continued. The only communication with the juror related to his physical condition. The physician had indicated that the juror was fully capable of participating in the jury deliberations.

Several cases not necessarily controlling point the way to our decision and appear to us to express an enlightened view.

Takarsie v. *State*, 162 P.2d 197, 199, an Oklahoma case, holds:

> "We do not think the taking of the juror to the drugstore for medicine to relieve his ailment by the bailiff who did not allow him to converse with anyone, while leaving the remaining jurors with the other bailiff was a violation of the terms of the Statute, which provides that the jury must be kept together and not permitted to communicate with any other person."

Williams v. *State*, 171 So. 386, an Alabama case, held as follows:

> "During the deliberation of the jury, one of the jurymen became ill and was allowed to leave the jury room and spend a short time with his son, a physician, in the private room of the presiding judge, and then allowed to resume deliberations with the remaining jurors when he got better. There is nothing to the prejudice of this defendant in the action of the court in permitting this juror, who was ill, to be attended by his physician, under the supervision of the court, and without any pretext that the act in any way con-

trolled the judgment of the jury in making up his verdict."

See also: *LaGuardia* v. *State*, 190 Md. 450, 58 A.2d 913; *Gray* v. *State*, 143 Fla. 588, 197 So. 333; *Haley* v. *State*, 123 Miss. 87, 85 So. 129; 23 A C.J.S. §1356, p. 955, n. 58.

A reasonable rule to follow under such circumstances would be to allow the court to determine in its discretion what course of action to follow when a juror becomes ill after deliberations commence. It would appear that it is the court's first duty to summon medical assistance. Defense counsel, defendant and the public prosecutor should be informed as promptly as feasible as to what has taken place. Treatment of an ill juror should not be required to await such notification. Nor should the failure to notify counsel of such fact, mandate reversal of the judgment, absent prejudice to the defendant.

In this case, the trial court represented to counsel that no discussion had occurred other than that relating to the juror's illness; that morphine was not administered and that the doctor had indicated that the juror was fully able to participate in deliberations. In our opinion, the record establishes the fact that the defendant suffered no prejudice by reason of the illness or the medical aid. Here there was no separation from the panel as contemplated by the Statute and consequently no violation of the statutory mandate. The circumstances are not substantially different than the need of a juror to respond to a call of personal

necessity or the separation of jurors in different sleeping rooms when resting for the night.

In future cases it would be good practice to detain the doctor in court if possible, and, if not possible, to make suitable arrangements for the doctor to attend at a later date in the event counsel wishes to examine the doctor concerning the matter. Deliberations of the jury should go forward in any event.

Under the circumstances of this case we find no statutory violation or prejudice, and consequently we affirm.

ALL CONCUR.

Appendix B

Affidavit for Search Warrant

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 1A, County of New York

State of New York)
County of N. Y.) ss.:

Patrolman John C. Hatton, Shield #17071 being duly sworn, deposes and says:

1. I am a Police Officer assigned to the First Deputy Commissioner's Public Morals Administrative Division.

2. I have information based upon statements supplied to me by an undercover New York City Police Officer assigned to the First Deputy Commissioner's Public Morals Administrative Division that premises 670 East 176th Street, apartment 2E, County of Bronx, City and State of New York is being used for illegal gambling in violation of Sections 225.05 and 225.15 of the New York State Penal Law, by Rudolph Prisco. Rudolph Prisco is known to the New York Police Department under B#79956. He has been arrested nineteen times for violations of the gambling statutes, and has been convicted seven times.

Said undercover Police Officer made the following observations: On Monday, March 24, 1969, from 2:30 PM to 6:05 PM, officer had premises 670 East 176th Street under observation. At 2:30 P.M., officer observed Rudolph Prisco

enter said location and proceed to and enter apartment 2E. Officer continued observation of premises and at 6:05 PM, he observed Rudolph Prisco exit from the building. Prisco proceeded to Belmont Avenue towards Tremont Avenue between 1908 and 1910 Belmont Avenue, and in an alley, Prisco stopped and removed from his right coat pocket a package which he threw to the ground. From his left coat pocket Prisco removed a package which he threw to the ground and then removed another package from his left coat pocket and threw it to the ground. Prisco then continued to Tremont Avenue. Officer immediately retrieved the three packages without losing sight of same and observed numerous envelopes with paper wrapped around them held together by rubber bands. Further examination revealed each package to be dated; package dated March 17, 1969 contained two bankers statements, 32 envelopes with identities of collectors, inside the envelopes were approximately 3,040 slips of paper having approximately 209,760 plays of MRHP with amounts; package dated March 18, 1969 contained 2 bankers statements with 34 envelopes with identities of collectors containing approximately 1,122 slips of paper bearing approximately 71,930 plays of MRHP with amounts; package dated March 19, 1969 contained 2 bankers statements with 27 envelopes with approximately 648 slips of paper being approximately 29,160 plays of MRHP with amounts and identities.

Premises 670 East 176th Street, apartment 2E, County of Bronx, City and State of New York was verified through Consolidated Edison Company as being registered to James Ercolani.

Appendix B

3. Based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that such policy slips, written records and other gambling paraphernalia commonly used in unlawful policy activities, and may be found in the possession of Rudolph Prisco and James Ercolani or at premises 670 East 176th Street, apartment 2E, County of Bronx, City and State of New York.

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, in the form annexed, authorizing the search of and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge, justice or magistrate.

s/ John C. Hatton	17071	Ptl	MPAD
Police Officer	Shield	Rank	Command

(Duly sworn to
March 25, 1969)

s/ Arthur Braun

Judge